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February 21, 2003

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001

Re: STB Ex Parte No. 638, Procedures To Expedite Resolution Of Rail Rate Challenges To Be Considered Under The Stand-Alone Cost Methodology

Dear Secretary Williams:

Enclosed for filing in the referenced proceeding please find an original and 10 copies of the written statement of Mark W. Schwirtz on behalf of The Western Coal Traffic League. Mr. Schwirtz will be appearing on behalf of WCTL at the hearing scheduled for February 27, 2003. Additionally, please find 3 WordPerfect Diskettes, containing the filing in electronic form. Copies of the statement are being served this date by mail, upon all known parties of record.

An extra copy of the statement also is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for
The Western Coal Traffic League

KJD:dmb

Enclosure

STATEMENT OF
MARK W. SCHWIRTZ
Senior Vice President and Chief Operating Officer
ARIZONA ELECTRIC POWER COOPERATIVE, INC.
on behalf of
THE WESTERN COAL TRAFFIC LEAGUE
and
CONSUMERS UNITED FOR RAIL EQUITY
in
STB EX PARTE NO. 638
PROCEDURES TO EXPEDITE RESOLUTION OF
RAIL RATE CHALLENGES TO BE CONSIDERED
UNDER THE STAND-ALONE COST METHODOLOGY

February 27, 2003

Chairman Nober and Members of the Board:

I appreciate the opportunity to appear before you today and share the views of the Western Coal Traffic League and my own company, Arizona Electric Power Cooperative, concerning the changes that the Board has proposed in the procedures to govern coal rate cases under the stand-alone cost standard. I note as well that the statement I offer here is joined by Consumers United for Rail Equity.

WCTL and its members have been active in all matters related to the development of coal rail rate policies by the STB and its predecessor since prior to the Staggers Rail Act of 1980. Individual League members, including my own company, have been and are parties to individual maximum coal rate proceedings. WCTL itself was a principal participant in the proceedings that led to adoption of the Coal Rate Guidelines in 1985.

The Guidelines, which largely accepted and implemented proposals made by the railroad industry, sought to strike a balance between railroads' interests and those of their captive coal customers. Subject to a minimum floor of 180% of variable costs set by statute, a railroad could charge any rate it chose so long as it wasn't higher than the rate that an efficient, hypothetical competitor would charge to serve the complaining shipper and other shippers in a logical customer group, assuming coverage of all relevant costs and a reasonable return on investment. This standard, known as the stand-alone cost or "SAC" test, was sponsored by the railroads, and was designed to implement the Ramsey Pricing principles that the railroads persuaded the Board's predecessor to adopt.

Through the late 1980s and the 1990s, the SAC test seemed to work reasonably well. A relative handful of coal cases were brought under it, and shippers and carriers alike increasingly relied on negotiated contracts to govern the terms of transportation. Even captive coal shippers did business by contract, as the SAC test allowed both sides to calculate what might be a lawful regulatory maximum, and so helped draw them into mutual agreement.

This decade, however, has seen a change in the landscape. Motivated by various forces, the few remaining Class I mega-railroads have embarked on campaigns to raise rates on captive traffic significantly, and rely more on common carrier pricing. These campaigns have been announced by the railroads' CEOs, and are no secret. The

predictable result has been an increase in the number of rate cases before this Board, as the railroads' aggressive revenue demands have left many coal shippers with no real choice but to resort to regulatory remedies.

The history of proceedings under the Coal Rate Guidelines shows that for high volume movements to destinations such as electric power plants, the combination of a properly administered SAC test and the 180% variable cost floor has tended to moderate the railroads' pricing on captive coal shipments, while still guaranteeing them a significant mark-up over costs. Knowing this, and apparently intent on avoiding any constraints on their rates, carriers have responded to the recent spate of rate cases with a two-pronged tactical defense.

First, through motions and requests for new general interest proceedings, the railroads have sought to change the SAC rules to skew the results in their favor. In the Summer of 2001, for example, BNSF and UP joined in asking the Board to put four (4) pending coal rate cases on hold, revisit certain elements of the SAC methodology which have been settled for years, and adopt changes designed to drive up rates and make it harder for shippers to prevail. To its credit, the Board rejected the request. The carriers, however, continue to seek to alter and bias the SAC rules in their favor in the individual cases themselves.

We are seeing a similar pattern in the area of variable costs. Despite the acknowledged efficiencies and lower costs associated with unit train coal service versus

system average service, and despite the fact that for years both shippers and railroads used movement-specific data to adjust system average costs to reflect these efficiencies, the railroads now increasingly are taking the position that they no longer keep records of movement-specific data. In effect, they argue for a default back to system average costs, which of course drives up the variable cost numbers and the jurisdictional rate floor.

The railroads' second tactical weapon is procedural delay. Though the Board's rules contemplate completion of the evidentiary phase of a rate case within seven (7) months, that rarely if ever is possible. By manipulating the discovery process -- which they largely control since they are in possession of most of the data that complainants and the Board need -- the carriers force schedule extensions or even suspensions.

One way they do this is to wait until the end of the 75-day discovery period to actually produce documents and computer data requested by shippers. As there usually are problems with the completeness of the data or disputes over withheld evidence, this tactic presents the shipper with a Hobson's Choice of either asking for an extension of the schedule to deal with the problems, or proceeding on schedule without having all the data needed to make a complete presentation. Usually, the result is delay. In a similar way, carriers lodge routine and repeated objections to the production of documents and records that the Board already has ordered produced in prior cases. This leads to otherwise unnecessary motions to compel that consume more time and more of the Board's and the parties' resources. Again, the result is delay.

The Western Coal Traffic League applauds and supports the Board's past efforts to reduce delay and expedite decisions in coal rate cases under the SAC test. The standardized format rules that were adopted in Ex Parte No. 347 (Sub-No. 3), for example, should make a positive contribution in this area if all parties seriously abide by them. The desire for expedition, however, should never be allowed to jeopardize the accuracy of the analysis or the ability of parties to present complete and competent evidentiary cases. Eliminating discovery altogether or requiring parties to submit cases 30 days after a complaint is filed certainly would expedite decisions; those decisions, however, would not be very sound or well-supported.

In this proceeding, the Board has proposed three (3) changes to its procedural rules that are said to be motivated by a desire to reduce delays and expedite the resolution of coal rate disputes. WCTL agrees that with minor modifications that we have outlined in our written Comments, two (2) of these three (3) proposals could contribute positively to the Board's stated goals without compromising the rights of shippers to have a reasonable opportunity to present their cases for rate relief. The third of these proposed changes, however, respecting the standard for discovery in SAC cases, is not needed and most certainly would be counterproductive. It should not be adopted.

WCTL agrees that the Board's proposal for pre-complaint mediation could encourage parties to stipulate or resolve selected issues, that in turn could help streamline complaint proceedings. Frankly, we are skeptical that mediation will lead to outright

settlements; typically, coal rate complaints are filed as a last resort only after a shipper and carrier have spent months in unsuccessful negotiations. So long as the mediation exercise cannot be abused or become a tool for further delay, however, WCTL believes it can be beneficial and is prepared to support it. To this end, WCTL's Comments propose certain specific changes in the proposal as offered by the Board:

First, carriers must be required to respond promptly to shipper requests for the establishment of new common carrier rates, as only a rate subject to STB jurisdiction could be the subject of STB-ordered mediation. WCTL has suggested that carriers honor all requests made within five (5) months of the start of common carrier shipments, so that the parties would have an opportunity to negotiate privately before bringing their dispute to a mediator, and the 60-day mediation would be concluded by the time shipments subject to a complaint were scheduled to start.

Second, the Board should mandate that all information exchanged during mediation will be kept strictly confidential, and not used for any purpose outside the mediation. A related corollary is that neither party should be permitted to comment on the other party's positions or conduct during mediation in any subsequent litigation. The parties must retain complete flexibility with respect to their presentations in mediation, and neither should be compelled to offer a preview of the case that it would present to the Board, or otherwise be forced to absorb the burden of costly or complex evidentiary showings.

Third, the 60-day mediation period should only be subject to extension if both sides agree. Continued mediation is pointless if one side believes impasse has been reached, and if the period could be extended over a party's objection the only result would be the same litigation delays that the proposed rules changes are intended to reduce.

WCTL also endorses the Board's proposal to expedite rulings on motions to compel, and encourage involvement by STB staff to try to broker negotiated resolutions of discovery disputes that may arise. As we explained in our Comments, however, a few modifications would better promote the Board's goals and protect litigants' due process rights.

First, a staff conference should be held if requested by either party, especially when there is doubt as to the form in which certain relevant data is kept. Certainly, a facilitated dialogue between the parties is a more preferable way to clarify discovery requests than a repetitious cycle of requests, motions, replies, and supplemental requests.

Second, the Board should make sure that neither party provides information or data to the Board staff that is not also provided to the other party at the same time. The staff conferences should be for the purpose of resolving disputes, not allowing one side to try to advance its cause through ex parte contact.

Third, the Board should deal separately with the discovery of transportation contracts. In every SAC case, the shipper needs access to certain transportation contracts. The railroad usually is willing to produce the contracts, but can't without a Board order because of confidentiality clauses in the contracts themselves. Historically, the Board and the parties have had to go through a motion-and-decision process that is uncontested and substantively unnecessary, but still takes up considerable time. This needless delay could be avoided if the Board amended its standard Protective Order to include a specific directive to the railroad that it must produce transportation contracts that are relevant to the complainant's proposed stand-alone route and traffic group.

While the League basically supports the rules charges that I've just addressed, with the modifications described in our Comments, we are very much opposed to the Board's proposal to change the basic standard for discovery in SAC cases. This proposed change is prejudicial, unnecessary, and counter-productive, and should not be adopted.

As we explained in our Comments, a new discovery standard that narrows the scope of data and documents that must be made available would overwhelmingly prejudice shippers, as they are the parties most in need of discovery to assemble their cases. The original Coal Rate Guidelines decision and every coal rate decision since have made clear that for the SAC test to work properly, shippers need broad access to information and documents that are solely in the possession of the railroads. The same is

true of variable costs. Raising the bar to complete discovery simply would play to the carriers' current strategy of withholding relevant data in order to force reliance on system average variable costs, and deny complainants the opportunity to assemble a proper SAC presentation. The proposed new test would reward past obstructionism.

The stated purpose of the proposed new discovery standard is to try to streamline the process and reduce procedural delay. WCTL believes that strict enforcement of the standards and precedents that the Board already has established, coupled with the proposal to expedite rulings on motions to compel, will accomplish this purpose. As we showed in our Comments, the Board's rulings under the current standard already consider the need for disputed data and the relative burden of producing it. In balancing the competing interests of shippers and carriers, the Board already applies the principles behind its proposal. A change in the language of the rule itself is not needed, and only would be exploited by the railroads to withhold relevant evidence.

This is graphically demonstrated by the Burlington Northern & Santa Fe Railway's comments in this proceeding. In AEPCO's own pending rate case, Docket No. 42058, the Board ordered BNSF to produce road property investment and other relevant data after assessing AEPCO's need for the information and its inability to obtain it elsewhere -- essentially the same test the Board now proposes to adopt. In its comments, however, BNSF takes the position that if that test was in place it is "unlikely" that it would have had to produce the data in question. In other words, BNSF admits that it

intends to resist what the Board already has found to be legitimate discovery requests, by arguing that the complainant does not have a "clear demonstrable need" for the evidence. There is no reason not to expect that the other railroads would do the same thing.

In our view, the proposed new discovery rule would be counter-productive. As BNSF's comments here show, railroads would seize the new standard as a weapon, and try to exploit it to deny shippers access to data that the Board already has found is relevant and necessary to a proper evidentiary presentation on variable cost and/or SAC issues. The result will be more, not less discovery litigation, and more procedural delays.

My company has experience not only in coal rate litigation before the Board, but in general civil litigation, commercial arbitrations, and regulatory proceedings before FERC and Arizona state agencies. Neither the typical number of discovery requests nor the volume of data and documents produced in a rate case under SAC is out of line with that which is usually involved in commercial disputes where millions of dollars are at stake. The Board's desire to reduce delay and expedite decisions in cases brought before it is laudable, and we support it. Respectfully, however, we submit that the record shows the best way to do that is to aggressively enforce your existing rules and precedents, and firmly resist railroad efforts to revise established rules and standards in order to rig the game in their favor.

I appreciate this opportunity to appear and share with you the views of WCTL and its members, including my own company, and I would be happy to respond to any questions that you have.

Thank you.